4th Congress of the World Conference on Constitutional Justice

THE RULE OF LAW AND CONSTITUTIONAL JUSTICE IN THE MODERN WORLD

11-14 September 2017, Vilnius, Lithuania

THE NORWEGIAN ANSWERS TO THE QUESTIONNAIRE

A. The rule of law and constitutional justice in the modern world

I. The different concepts of the rule of law

1. What are the relevant sources of law (e.g. the Constitution, case-law etc.) which establish the principle of the rule of law in the legal system of your country?

The Norwegian constitution, which was adopted in 1814, is based on the idea of liberal democracy and the rule of law, and its initial text laid the foundation for the current concept of the rule of law in Norway. It provided for the division of powers between the three branches of the state and for popular sovereignty, and even contained a small "Bill of Rights" concerning arbitrary arrest, torture, punishment without law, retroactive legislation, free speech and property rights. Since 1814, the Constitution has been amended more than 300 times, affecting directly or indirectly almost all provisions, and resulting in a different and considerably wider notion of the rule of law than what the 1814-text was based on. Notably, in May 2014, the "Bill of Rights" in the Constitution was expanded to include the basic civil and political rights prescribed for in the general international human rights conventions, as well as certain social, economic and cultural rights and the basic rights of the child. At the same time, a general provision was added, obliging the state to "respect and secure" human rights as they are established in the Constitution itself and in international human rights conventions binding on Norway.

The Constitution conveys only the basic and defining rules and principles governing the state, and the actual content of these rules and principles are developed through – and also supplemented by – both statutory law and Supreme Court case law, in interplay with legal doctrine. To give an example, the Constitution was, until recently, silent on the question of whether courts could review acts of Parliament to decide if they conflicted with the provisions of the Constitution. In 1866, the Supreme Court declared, in the case *Grev Wedel Jarlsberg v. Marinedepartementet*, that it would not apply any law that it deemed repugnant with the Constitution. This opinion was repeated in several other cases in the following years, and came over time – supported also by legal doctrine – to be considered a principle of customary constitutional law. In 2015 it was incorporated into the text of the Constitution by a new section 89, stating that in cases before the courts, the courts have a right and an obligation to review statutes and other acts by state authorities to decide if they contravene the Constitution.

Accordingly, the Norwegian concept of the rule of law is founded – in its core – on the Constitution, which is a living instrument that is continuously interpreted, developed and complemented by statutory law, case law and legal doctrine.

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

There is no official or fixed conception of the rule of law in Norwegian jurisdiction, and it is a futile exercise to give a precise description of its content, *inter alia* because the term is awarded different qualities depending on whether it is used in an historical, philosophical or legal context. Scientific accounts, however, commonly define the rule of law by four basic principles: (**1**) the state is founded on and bound by rules of law, and is accountable to rules of law in the exercise of all its powers over the citizens, (**2**) the principle of division of powers; the collective authority of the state is separated between the legislative, the executive and the judiciary branch, which are independent of each other, (**3**) the principle of popular sovereignty/democracy; burdens on the citizens are imposed only by the citizens themselves by way of a democratically elected legislative assembly, and (**4**) the state shall respect and secure fundamental rights.

The latter, which today is an undisputed and constitutionally established part of the rule of law in Norway, entails that our legal order is based on a substantive concept of the rule of law. Furthermore, it is commonly accepted that the rule of law in Norwegian jurisdiction includes also protection of human dignity and social rights, such as welfare, material equality etc., i.e. the most extensive version of the rule of law according to international legal theory on the subject.

3. Are there specific fields of law in which your court ensures respect for the rule of law (e.g. criminal law, electoral law etc.)?

The Supreme Court of Norway is a general court, and its jurisdiction comprises all fields of the law, including administrative and criminal law. The court does, by its very nature and constitutionally assigned role, ensure respect for the rule of law in all cases before it, most evidently so, in criminal cases. The rule of law is further more a core principle in public law cases, more specifically where the case regards the validity of an administrative decision imposing a duty or a burden on one or more individuals.

The Supreme Court only handles cases brought before it by one of the parties. It can neither render opinions on legal matters nor scrutinize the constitutionality of a legal act unless these issues arise in a specific case brought before it in an appeal.

4. Is there case law on the content of the principle of the rule of law? What are the core elements of this principle according to the case law. Please provide relevant examples from case law.

As mentioned above under question 2, there is no official or fixed definition of the rule of law governing the Norwegian state, neither in the case law of the Supreme Court nor in any other relevant source of law. The core principles described under question 2, emanate from the provisions of the Constitution, as well as the legal tradition and values embodied in it, and are structured as such mainly in theoretical expositions pertaining to legal and political science.

Based on the substantive conception of the rule of law described above, the Supreme Court is the predominant guardian that all governmental intervention in the private sphere is in accordance with the law and fundamental rights, and the court enforces the prevailing requirements under the rule of law in all cases that come before it. The Supreme Court has never, however, purported to give an authoritative definition or exhaustive list of the elements constituting the rule of law in Norway.

5. Has the concept of the rule of law changed over time in case law in your country? If so, please describe these changes referring to examples.

The law as an institution in society and a part of the Constitution has undergone extensive changes over the past 200 years, concurrently with contemporary social demands. Norway has, in essence, developed from a liberal constitutional state ensuring "law and order", into a social welfare state which sees it as its task to actively provide for the well being of its citizens. In terms of the legal system, this process can be described as the law constituting a modern society, which in turn has constituted an autonomous and independent legal system. Accordingly, society has become increasingly "legalized"[1] and the legal system – in particular the courts – correspondingly more powerful at the expense of the legislative and the executive branch. The rule of law, originally a formal and institutional concept referring to the foundation for and limits on the state's use of its powers, has thus evolved into a substantive conception, including also a broad set of, if not rights *per se*, at least values and standards intended to safeguard the autonomy of the individual.

The courts have played a significant part in this process, *inter alia* by developing the doctrine of constitutional review, cf. questions 1 and 10, and the principles determining the impact of international law in Norwegian jurisdiction, cf. questions 6 and 9. Changes to the effect described above, however, are not driven by the courts on a case-by-case basis, but by the legal system as a whole in response to societal trends and demands.

[1] In Norwegian: "rettsliggjort" – the term refers to the fact that the law has expanded into all areas of society and become more detailed, specialized and focused on individual rights and freedoms.

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

Yes, international law has had a remarkable impact on the development accounted for above under question 5. Particularly from the 1990s and onwards, Norwegian law has been increasingly influenced by international law, notably the European Convention on Human Rights and related case law from the European Court of Human Rights, and EU-law by way of the EEA Agreement[2]. Both of these "supranational" legal systems have made considerable contributions to the strengthening of individual rights and freedoms in Norwegian law, not only such as can be considered fundamental human rights, but also economic, social and cultural rights, and to the increased social and political significance of the national courts. Further more, several UN instruments (especially the Convention on the Rights of the Child, but also, i.a., the International Covenant on Civil and Political rights, the International Covenant on Economic, Social and Cultural Rights, , and the Convention on the Elimination of All Forms of Discrimination against Women) have made considerable impact on Norwegian law. A prominent example of this is the expansion of the "Bill of Rights" in the Constitution in May 2014, cf. question 1, which was – more or less – directly based on the parallel rights and freedoms in the general international human rights conventions.

II. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

Norway is and has always been a relatively homogeneous society, with the benefit of not experiencing major internal conflicts. Accordingly, the call for paramount changes in the constitutive structures of the Norwegian society has never been overwhelmingly strong. It is fair to say, also, that we have never – at least not yet – encountered controversies of for example a political, economic, ethnical or religious nature of such depth and dimensions as to really challenge the basic structures or essential features of the Constitution, including the rule of law.

The closest we have come to a "major threat to the rule of law", is the German occupation during World War II, which effectively sat aside the Norwegian constitution. The justices of the Supreme Court, however, responded to this threat by withdrawing from their posts in the years 1941 to 1945. They thus denied legal justification of the occupant's ambition to undermine the Constitution, thereby actually defending the Constitution. Once back on duty after the liberation in 1945, the Supreme Court declared that the Constitution was again in force, and that the Court was prepared to protect it.

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

International events and developments such as migration and floods of refugees, terrorism and cybercrime, definitely challenge the existing structures of the rule of law also in Norway, by creating tension between governmental need for control and individual freedom. As previously mentioned, the role of the Supreme Court is limited to trying concrete cases brought before it through the means of an appeal. In cases where international events and developments may challenge individual rights, the court will, as in other cases, pay due attention to well established rights of judicial review and legal certainty.

Such trends entail that the importance of the legal system and the corresponding need for reliable legal aid and dispute resolution institutions will continue to increase, thus – at least in the longer term – posing ethical and professional challenges to the actors within the system.

9. Has your court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your court compared to regional/international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts/bodies? What is the essence of these difficulties? Please provide examples.

The Supreme Court is quite frequently faced with cases in which there is a potential conflict between national and international legal norms, and has developed specific principles for resolving such conflicts. Notably, after the constitutional reform in 2014 expanding the "Bill of Rights", the Supreme Court stated, in the so called "*Maria-case*" from 2015, that the fundamental rights of the Constitution must be interpreted "in the light of" their international counterparts. However, the Court underlined that it is the Supreme Court – not the international supervisory institutions – that is assigned the task of interpreting, clarifying and developing the fundamental rights of the Constitution.

The case law of the Supreme Court is generally in line with that of the relevant international courts and supervisory institutions, but the last couple of decades have brought a few examples of the Supreme Court's decisions being overturned by either the European Court of Human Rights or the UN Human Rights Committee. An illustrative example concerns the right of the accused to a reasoned decision in criminal cases. A reform of the criminal procedure in Norway in the middle of the 1990s, introduced a power for the courts of appeal to reject appeals without a main hearing if the appeal had no prospect of succeeding. Such decisions are based solely on the documents of the case, and originally, the courts were not required to give reasons for their decision to reject an appeal. The Supreme Court held in several cases that this system was in accordance with Article 14 of the UN Covenant on Civil and Political Rights. In 2007, however, the system was challenged before the UN Human

Rights Committee, and the Committee concluded that "*the lack of a duly reasoned judgment, even if in brief form, providing a justification for the court's decision that the appeal would be unsuccessful*", impaired the effective exercise of the right to have one's own conviction reviewed. This Committee decision led the Supreme Court to state that the system could not be upheld, and shortly after that, the Criminal Procedure Act was amended to include a requirement that the decisions to reject appeals must be reasoned.

As this example shows, once a conflict has been established between national law and international law binding on Norway, both the Supreme Court and the other national authorities will take the necessary steps to harmonize national and international law. Thus, in general, the implementation of decisions by international courts/institutions at the national level, does not offer any particular difficulties.

III. The law and the state

10. What is the impact of the case law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

As mentioned above under question 1, section 89 of the Norwegian Constitution provides that in cases before the courts, the courts have a right and an obligation to review acts by governmental authorities to decide if they conflict with the Constitution. This power of review, which encompasses both statutes, regulations and administrative decisions, was developed, as said, in Supreme Court case law from the middle of the 19th century. Although the power is attributed also to the lower courts – the district courts and the courts of appeal – cases concerning constitutional issues will in practice always be appealed to the Supreme Court for a final and authoritative decision.

The Supreme Court can review statutes and other governmental acts only in concrete cases before it, where it is alleged that one or more specific provisions of such acts contravene the Constitution. A Supreme Court ruling to the effect that a statute is in defiance of the Constitution, will not in itself cause an annulment of the relevant statute – only the Parliament has the power to repeal statutes. Instead, the statute is set aside in the sense that is not applied in the specific case at hand, and in practice, it will be set aside also in subsequent cases until it is amended in accordance with the Supreme Court decision.

In the "*Kløfta-case*" from 1976, the Supreme Court adopted the *preferred position principle* developed by the US Supreme Court, entailing that the intensity of constitutional review varies in respect of the subject matter of the statute in question. In essence, this principle implies that the Court's scrutiny will be more intense as regards constitutional provisions protecting individual freedom and security, than it will in respect of provisions protecting economic positions.

The current case law of the Supreme Court demonstrates that the Court is readily prepared to apply and enforce constitutional rights, even in cases where the legislation in dispute is

the result of a political battle or a strong political will. The constitutional reform in 2014 also corroborates such "constitutionalism", partly by expanding the catalogue of individual rights and partly by emphasizing the Supreme Court's role as a constitutional court.

11. Do the decisions of your Court have binding force on other courts? Do other/ordinary courts follow/respect the case law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

The decisions of the Supreme Court are binding on the lower courts in the sense that the Court reviews and/or annuls decisions by the lower courts on appeal to the Supreme Court. More generally, however, the Supreme Court's decisions constitute judicial precedent; the Court's interpretation of the law is universally valid in Norwegian jurisdiction and thus normative not only for the parties in a given case, but also for others who apply the law, including the lower courts, and for Norwegian citizens in general. This effect of the Supreme Court case law is rooted in our court hierarchy with the Supreme Court as the court of final instance, cf. section 88 of the Constitution, and in our legal tradition and custom.

In determining the state of the law, the lower courts will thus apply the case law of the Supreme Court as precedent. Furthermore, in the event that one or more cases unveil a need to adjust or develop existing case law from the Supreme Court, the question of deviating from such case law must be decided by the Supreme Court itself, usually in a Grand Chamber of 11 justices or by the Plenary Court. The doctrine of precedent functions according to its purpose, and the lower courts are obliged to apply the case law of the Supreme Court where relevant. The court system in Norway is structured in a single hierarchy. All cases must be filed before one of our 64 district courts which have full jurisdiction in all cases. The cases decided by the district court may be appealed to the courts of appeal, of which there are six, and from the latter to the Supreme Court, of which there is one. There are thus no conflicts between the Supreme Court and other Norwegian courts as we do not have a system with separate constitutional courts or administrative courts.

12. Has your Court developed/contributed to standards for law-making and for the application of law? (e.g. by developing concepts like independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).

Several principles concerning the rule of law, many of which to day are considered both fundamental and self evident, have been developed through case law. Many of these have been incorporated in the Constitution or codified in statutory law.

The primary formal requirements for the adoption of statutes and substantive requirements for their application, follow from the Constitution and the general human rights conventions, notably the European Convention on Human Rights. For example, the legislative procedure is described in section 76 to 79 of the Constitution, and section 96 establishes the principle of *nulla poena sine lege* – no punishment without law. These general requirements, however, are defined in the case law of the Supreme Court, and there is an abundance of decisions

regarding, *inter alia*, requirements of clarity and accessibility, access to court, fair trial, *ne bis in idem*/double jeopardy etc. The basis for developing this case law was strengthened by the constitutional reform of 2014, incorporating into the text of the Constitution the basic civil and political human rights, such as the right to a fair trial before an independent and impartial court within reasonable time and a general prohibition against deprivation of liberty without law.

13. Do you have case law relating to respect for the rule of law by private actors exercising public functions?

Pursuant to the Norwegian Public Administration Act section 1, third sentence, a private legal entity is considered an administrative body in cases where it exercises public authority prescribed by law. In such cases, which up to date are rare, the procedural rules of the Public Administration Act applies to the private person, although its general activity does not fall within the scope of the Act.

Private persons' accountability to the law when exercising public authority was a fact also before the adoption of the Public Administration Act in 1967. An example is a Supreme Court case from 1964, concerning the State Corn Enterprise ("*Statens kornforretning*"), which was organized as a private legal person with a statutory exclusive right to import and buy all grain feed for use in Norway. The relationship between the Corn Enterprise and private wholesalers was determined by contract, the conditions of which were largely dictated by the Corn Enterprise. Some of the terms were quite strict and could potentially exclude certain smaller wholesalers. The Supreme Court held in its ruling that a monopoly established by law could not lay down such strict conditions without statutory basis, and thus excluded the relevant conditions from the contract in dispute.

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case law related to the accountability of public officials for their actions?

The government and the municipalities are liable for negligence on the part of their officials, as regards both decisions and actions, pursuant to the general principles of the law of damages. There are also a number of different penal provisions criminalizing professional misconduct and fraud, corruption, extortion etc. Such provisions are generally enforced against civil servants to the same extent and in the same way as against other persons; civil servants evading criminal liability is not a widespread problem in Norway.

IV. The law and the individual

15. Is there individual access to your Court (direct/indirect) against general acts/individual acts? Please briefly explain the modalities/procedures.

Individuals may challenge both general and individual acts through actions before the courts, provided the requirements of standing are fulfilled. The Norwegian Civil Procedure Act, section 1-3, expresses this as a requirement that the plaintiff must show a "sufficient and genuine need to have the asserted claim decided in relation to the defendant", i.e. that the plaintiff and the defendant have a sufficient connection to the subject matter in dispute so as to justify the court's entertainment of the dispute. As regards actions concerning the exercise of public authority, this entails that the relevant act must be either directed at the plaintiff directly, or affecting him or her in such a way that it is natural to allow him or her to advance his or her interest by way of an action before the courts.

If an individual desires to challenge either a general act, on account of, *inter alia*, inconsistency with the Constitution or the European Convention on Human Rights, or the validity of an individual act, he or she must institute proceedings before the competent district court; there is no possibility of filing a lawsuit directly before the Supreme Court. Provided the requirements of standing and other procedural requirements are met, the action will be tried and adjudicated by the district court. The judgment of the district court can be appealed to the competent court of appeal, which – provided there is no basis for dismissing or denying the appeal – will effect proceedings and adjudication, more or less in the same way as in district court. The judgment rendered by the court of appeal may in turn be appealed to the Supreme Court.

Because the purpose of the Supreme Court is a bit different than that of the lower courts – it focuses primarily on clarifying and developing the law, as opposed to dispute resolution, which is the main task of the lower courts – an appeal cannot be tried by the Supreme Court unless the Appeals Selection Committee of the Court consents pursuant to the Civil Procedure Act, section 30-4. Leave to appeal will be given only if the appeal concerns a legal issue that has a bearing beyond the scope of the specific case at hand, or if it is especially important for other reasons that the case is tried by the Supreme Court. It is safe to say, however, that if the case raises constitutional or human rights issues of a certain substance, the appeal will surely be allowed.

16. Has your Court developed case law concerning access to ordinary/lower courts (e.g. preconditions, including costs, representation by a lawyer, time limits)?

The primary procedural requirements pertaining to the concept of "access to court" are established in statutory law, complemented by the international requirements under, notably, the European Convention on Human Rights. Some statutory rules are largely general in nature and contain a fairly wide margin of discretion. Accordingly, they leave it to the courts to adapt the rules to contemporary social demands and conceptions of a "safe

and sound" procedure. Other rules, especially those regarding criminal cases, enlist invariable rights that leave the courts with little or no margin as regards access. The Supreme Court case law concerning access to court, including, *inter alia*, requirements of standing, capacity to sue and be sued, representation, time limits, costs etc., is extensive.

17. Has your Court developed case law on other individual rights related to the rule of law?

As mentioned, several fundamental principles concerning the rule of law have been developed through case law, largely through the decisions of the Supreme Court. This legal tradition dates back to the 19th century.

Since the emergence of international human rights instruments, the Supreme Court case law regarding fundamental individual rights has to a greater extent been based on the European Convention on Human Rights and other general human rights conventions. There are, as stated above, many examples predating these conventions. A case from 1977, known as the "*medical record-case*", is illustrative. In its judgment in this case, the Court established that patients have a right to access their own medical records, despite the fact that such a right was not provided for by statutory or other written law. The judgment was, in essence, based on what the Court viewed as commonly accepted reasons of legal certainty and access to personal information.

As mentioned several times above, the "Bill of Rights" in the Norwegian constitution was expanded in 2014, thus giving the Supreme Court a stronger foundation for applying and developing fundamental rights in a national context. Recent judgments from the Court, for example the "*Maria-case*" from 2015, mentioned above under question 9, imply that the Supreme Court is highly aware of and strongly focused on its responsibility as a constitutional court and protector of fundamental rights and freedoms.

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

Section 2 of the Constitution refers to the rule of law as a value on which the Constitution is founded, but – as mentioned previously – the rule of law is not used or defined as a general concept, neither in the Constitution nor in any other relevant source of law in Norwegian jurisdiction. Instead, well established case law, the Constitution, and the secondary sources of law emanating from it, give rise to a long line of principles, rights and freedoms which ultimately reflect Norway's position as a state governed by the rule of law.